UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ADOLFO GARCIA-DEVARGAS and ILDEFONSO LOPEZ, | : | 15 CV 2285 (GBD) |
| Plaintiffs, | : | |
| -against- | : | |
| JOSEPH MAINO, individually, and d/b/a Handbags 100 King Street, and 119 FASHION WHOLESALERS LTD., | : | |
| Defendants. | : | |
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**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants Joseph Maino ("Maino") and 119 Fashion Wholesalers Ltd. (collectively "Defendants") respectfully submit this Memorandum of Law together with the accompanying Rule 56.1 Counter-Statement of Undisputed Material Facts, Declaration of Joshua Blechner and Affidavit of Joseph Maino in opposition to Plaintiffs' Adolfo Garcia-Devargas ("Garcia") and Ildefonso Lopez ("Lopez") (collectively "Plaintiffs") motion for summary judgment.

## Preliminary Statement

Defendant Maino ran a handbag and accessories business for many years in the Mulberry Street area of New York City. Maino was very loyal to his employees and many worked for him for several years, including Plaintiffs Garcia and Lopez. Lopez began working for Maino in 1993, and Garcia in 2003. He would provide help with troubles the workers were having. He would trust his workers to report sales figures and salary amounts; never second guessing their calculations. Maino always set his employees' salary at an hourly rate that was above the prevailing minimum wage. Most importantly, he paid those wages. His employees were like family to him, and no one was closer than Adolfo Garcia-Devargas and Ildefonso Lopez.

Maino's employees returned the favor by working long hours when the stores were busy. He, in turn, rewarded this hard work by providing a bonus payment based on the sales each employee made. This bonus payment/commissions exceeded the rate of pay that the employee would have received with time and half their regular hourly salary. The employees would inform Maino of the amount they were owed during the week, and he would trust what they said and pay them that amount. He always made sure it was at least time and half what they would have been paid for the hourly rate of pay for overtime.

Plaintiffs contend that Maino willfully cheated them out of overtime pay. Maino admits he was not the best at keeping records, but would never willfully withhold money owed his employees. Plaintiffs also contend that they worked the same hours and were paid the same rate throughout the entire six year New York Labor Law statutory period prior of the filing of the complaint. However, Plaintiffs' own testimony contradicts these assertions. In fact, all the parties testified that the Plaintiffs were paid varying hourly rates throughout their employment. All the parties also testified that there were several extended slow periods at the store that led to reduced sales and reduced bonus commission payments. Garcia testified that he would be out of the country for months at a time, while Lopez testified that he was sick and missed work for an extended period of time. Plaintiffs do not acknowledge any of these facts in their request to extrapolate six years of damages from the eleven weeks of forms.

Accordingly, Plaintiffs' motion for summary judgment fails. There are clear genuine material issues of fact regarding the number of hours that Plaintiffs worked over the course of their employment. Liquidated damages are also inappropriate as Maino acted in good faith and never willfully underpaid his employees. In view of the foregoing, and as discussed more fully below, the motion should be denied.

## Statement of Facts

Defendant Joseph Maino is the sole owner and manager of Defendant 119 Wholesalers Ltd. (Defendants respectfully direct the court to the accompanying Local Rule 56.1 Statement of Additional Material Facts ("Fact") No. 1) For many years, Maino ran a handbag and accessories business in the Mulberry Street area of New York City. (Fact No.2).

Plaintiff Lopez began working for Defendants in 1993 as a salesmen at the various establishments run by Defendants. (Fact No. 3). Maino trusted Lopez and often gave him the duties of acting manager, overseeing the other workers. (Fact No.4). Garcia began working for

Plaintiff in the 2003. (Fact No.5). Plaintiffs continued to be employed by Maino during the period between 2009 and 2014. (Fact No. 6).

There were no written employment agreements between the parties. (Fact No. 7). Lopez was paid $7 per hour in 2009-2012. (Fact No. 8). He was paid $8 per hour in 2012-2014, and $9 per hour in 2015. (id.). Garcia was paid $9.50 per hour in 2009 and $10 per hour from some point in 2009 to 2014, although he was not certain when his salary shifted from $9.50 to $10. (Fact No. 9).

Maino also paid his workers a bonus payment/commission based on sales each employee made in a week. (Fact No. 10). Commission rates at the store were .5% from 2009-2012 and 1% from 2013-2015. (Fact No.11). Rates were based on the sales, but the Plaintiffs would simply tell Maino what they were owed. (Fact No. 12). Maino trusted their requests and paid them accordingly. (Fact No. 13). All payments made to Garcia were in cash. (Fact No. 19) Payments made to Lopez were a combination of cash and check. (Fact Nos. 20).

The stores had fluctuating busy seasons as well. Both Garcia and Maino testified that from the end of December through April the stores were slow, and the parties were often not paid commissions due to the slow season. (Fact No. 15). During the slow season, Plaintiffs would work as little as 20-30 hours a week. (Fact No. 16). Garcia often went back to his home country for two to three months at a time due to the lack of work. (Fact No. 17). Besides the slow season, Lopez also took extended time off the last two years of employment when he was sick. (Fact No. 18). Maino always held their jobs for them for when they returned. (Fact No. 18). He would also help Lopez out by paying rent and even buying medicine for him when he was sick. (Maino Aff. at 13).

Defendants have produced time and compensation records for Garcia for 11 weeks between July and December 2014 and 17 weeks during the same period for Lopez. (Fact No. 21). The Forms indicate the hours each Plaintiff worked during a particular week and the commission payment paid in addition to the hourly rate followed by the total compensation for the week. (Fact No. 22).

For each week, it is clear that the commission payment exceeded any potential overtime payments based on time and half each employees hourly wage rate. (Fact No.23).

Maino always paid his employees what he honestly believed he owed them. (Fact No. 25). He never willfully withheld money due for overtime payments. (Fact No. 26). He believed in good faith that he was not only paying them proper overtime, but was in fact paying them more than what they were owed for overtime payments. (Fact No. 27). Based on these facts it is clear that Plaintiffs' summary judgment motion should be denied.

## ARGUMENT
## POINT I
## THE STANDARD GOVERNING THIS MOTION

Summary judgment is only proper where there is no genuine issue of material fact, and therefore such conclusive facts warrant the entry of judgment for the moving party as a matter of law. Kaytor v. Elec. Boat Corp., 609 F.3d 537, 545 (2d Cir.2010) (citing Fed.R.Civ.P. 56(c)(2)). When determining a motion under Rule 56, the court must "draw all reasonable inferences in favor of the nonmoving party." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). Summary judgment is therefore improper if any evidence in the record creates a reasonable inference of a question of fact for the non-moving party. Mines v. City of New York/DHS, 11 CV 7886 JGK, 2013 WL 5904067 (S.D.N.Y. Nov. 4, 2013).

If the moving party presents facts that tend to show that there is no question of fact remaining, then the non-moving party must point to evidence in the record that will create an issue of fact. *Id*. (citing Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir.1993)). There is ample evidence in the record to establish a genuine issue of material fact regarding the amount of overtime Plaintiffs worked and their rate of pay. The record is also clear that Defendants acted in good faith and did not willfully violate the FLSA or NYLL.

**POINT II**

**Plaintiffs' Summary Judgment Motion Should be Denied**

A. Plaintiffs' Summary Judgment Motion Fails as to their Overtime Claims

Plaintiffs argue that this Court should award damages for failure to pay overtime wages over a six year period based solely and exclusively on a snapshot of several weeks of wage forms completed in 2014. This assertion blatantly disregards the sworn testimony of Plaintiffs that their hourly rate of pay fluctuated over the course of the six year period at issue. In addition, all parties testified that the stores had both busy and slow seasons. Lopez also missed time due to illness and Garcia travelled back to the Dominican Republic for a few months at a time. This clearly establishes an issue of material fact as to total hours worked and compensation paid over the course of the six year period. As a result, Plaintiffs' summary judgment motion should be denied.

i. Plaintiffs testified they were paid different hourly rates over the course of their employment.

The Forms cannot be extrapolated over the course of the six year period because Plaintiffs own testimony demonstrates that they were paid different hourly rates over the course of their employment. Lopez was paid $7 per hour in 2009-2012. (Fact No. 7). He was paid $8 per hour in 2012-2014, and $9 per hour in 2015. (Fact No. 8).Garcia was paid $9.50 per hour in 2009 and $10 per hour from some point in 2009 to 2014, although he was not certain when his salary shifted from $9.50 to $10. (Fact No. 9). The forms only indicate payments for $10 per hour for Garcia and $9 per hour for Lopez.

ii. The testimony clearly indicates that Plaintiffs had a fluctuating schedule over the course of a given year.

Plaintiffs' memorandum of law completely disregards their own testimony and that of Defendants regarding their fluctuating yearly schedule. The Forms covered a selection of weeks between July and December. These months were actually some of the *busiest* months in the stores. Plaintiff Garcia, testifying about the slow season, indicated that sales were low "starting December, the end of December until March or the beginning of April, no commission was paid. The commissions were paid on the first week of April."(Garcia 28:12-15). Plaintiff Lopez testified that "[f]rom January to April, the sales were low. The copies were not sold and there was no commission." (Lopez 27:17-19). Defendant Maino corroborated their testimony by explaining that "you have to understand that there is a seasonality to our business. So in January and February and March to do 25 or 30 hours a week would be a lot. As you get into March, you could get a little more, then the hours become consistent to these type of hours that you see [in the Forms]." (Maino 64:7-65:5).

In addition, both Lopez and Garcia missed significant amount of time during the year for various reasons. Garcia would travel back to his home country of the Dominican Republic during the slow months. (Garcia 21:6-14). He would also often take time from work to run his own business. (Maino Aff. at 12). Lopez missed significant amounts of time during the last two years of employment due to illness. (Lopez 28:23-25) (Maino Aff. at 18).

This testimony clearly demonstrates that the hours on the Forms cannot be extrapolated over the course of a full year.

B. Plaintiffs' Summary Judgment Motion Fails as to their Liquidated Damages Claims

In order to prevail on a claim for liquidated damages a party must show that the alleged violation of the FLSA was "willful." Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 141 (2d Cir.1999). A willful violation is one where the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited[.]" id. If an employer is found to have willfully violated the FLSA, the employee is entitled to 100% liquidated damages.

The standard for liquidated damages for NYLL claims has evolved over the past six years. The FLSA "willfulness" standard is applicable only for liquidated damages under the NYLL for claims covering the time period prior to November 24, 2009 when the statute was amended. Montellano-Espana v. Cooking Light Inc., No. 14CV01433SJRLM, 2016 WL 4147143, at *6 (E.D.N.Y. Aug. 4, 2016); Gurung v. Malhotra, 851 F. Supp. 2d 583, 591 (S.D.N.Y. 2012)(internal citations omitted).

For violations between November 24, 2009 and April 8, 2011, the NYLL no longer mimics the willfulness standard. Instead, employees are entitled to liquidated damages unless Defendants can show they acted in good faith. Montellano-Espana id. Under both standards, liquidated damages for violations under the NYLL prior to April 8, 2011 is 25%. Finally, for violations after April 9, 2011, Defendants are still absolved of liquidated damages if they acted in good faith, but liquidated damages are assessed at 100%. id.

It is clear that Defendants acted in good faith and did not willfully violate the statute. Defendants believed that the commission payments compensated Plaintiffs above and beyond the entitled overtime compensation based on payment at half of their hourly rate of pay for overtime hours. (Blechner Decl.. at H; Maino Aff at 9). A review of the time sheets presented in evidence clearly corroborates this assertion. (Blechner Decl. at F and G). Defendants' believed this was sufficient under the regulations. (Maino Aff at 9). Because Defendants acted in good faith and did not willfully violate the statute, Plaintiffs are not entitled to any liquidated damages.

## CONCLUSION

For the reasons stated above, Defendants respectfully request this Court deny the Plaintiffs' Motion for Summary Judgment in its entirety and for all other relief that this court deems just and proper.

Dated: New York, New York
August 12, 2016

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